12

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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 166

ALL STATES FREIGHT, INC., *Appellant*,

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, *et al.*

Appeal from the United States District Court for the Northern District of Ohio, Eastern Division

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BRIEF OF APPELLANT IN OPPOSITION TO APPELLEES' MOTIONS TO AFFIRM

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INDEX

PAGE

Statement 1

The Questions are Substantial 3

CASES CITED

Universal Camera Corporation v. National Labor Relations Board 340 U. S. 474 3

C. E. Hall & Sons v. United States 88 Supp. 596 4

Lang Transportation Company 75 F. Supp 915, 931 4

Interstate Commerce Commission v. Parker 326 U. S. 60 4

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No. 166

All States Freight, Inc., *Appellant*,

v.

The United States of America, Interstate Commerce Commission, Rail Carriers in Central Territory, Dixie-Ohio Express Company, *Appellees*

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STATEMENT

This brief is in reply to the motions to affirm filed by the United States and Interstate Commerce Commission and Rail Carriers in Central Territory, Appellees.

Appellant filed with the Interstate Commerce Commission its application for "grandfather" rights under Section 206(a) of the Motor Carrier Act of 1935. Subsequently

and before the grandfather application was heard, appellant filed an application under Section 207, seeking substantially the same rights as were claimed under the "grandfather" application. The applications were finally disposed of by the entry of an order by the Interstate Commerce Commission on January 16, 1950 which granted in large part the authority sought under the grandfather application, and denied the application under Section 207.

The order granting the "grandfather" application authorized service at Mansfield, Ohio without restriction, but limited the service to towns in the area around Mansfield, Ohio to the pickup of east-bound shipments and the delivery of west-bound shipments. Since appellant had been serving those towns for many years without restriction and wished to continue that service, it filed in May, 1950, an application under Section 207 of the Motor Carrier Act for authority to serve all points and places within a radius of 30 miles of Mansfield, Ohio without restriction.

Six other carriers filed similar applications and the matter came on for hearing before a Joint Board consisting of an official of the Ohio Public Utilities Commission. The hearing lasted for two full days, and after several months the Joint Board issued a proposed report and order which recommended that the appellant be granted the right to serve seven of the towns within the area, that some other applicants be given lesser rights, and that the remaining applications be denied.

Exceptions to the proposed report and order of the Joint Board were filed by all applicants except the appellant and several intervening protestants. Division 5 of the Interstate Commerce Commission on January 17, 1951 entered an order denying all of the applications and appellant seasonably filed a petition for reconsideration and for rehearing which was denied by the full Commission on December 10, 1951. The present litigation followed.

The appellant has been and is now operating without restriction to and from the seven towns in question by virtue of extensions of the effective date of the order which extensions terminated on May 13, 1952, and subsequently under stay orders issued by the District Court and this Court.

THE QUESTIONS ARE SUBSTANTIAL

Appellees, United States of America and Interstate Commerce Commission, and Appellee Central Territory Railroads move to affirm on the grounds that the appeal presents no substantial questions. Appellant contends that the questions are substantial for the following reasons:

1. The applications were heard by a Joint Board member, an official of the state of Ohio, well informed as to the local condition and needs. His proposed report was based upon the testimony of witnesses whom he observed, and the exhibits of record. That report gave due allowance to the various factors involved and clearly shows an understanding of the problems presented and the authority which he recommended be granted to the applicant and other applicants was that authority which the record showed they were entitled to receive. The Commission, on the other hand, disregarded this discriminating assessment of the record, treated all applications as if there had been a complete failure of proof as to each, and dismissed them all. With respect to the appellant's application it is obvious that the Commission considered only that evidence which militated against granting the application and disregarded the clear proof submitted by applicant for the necessity of the continuance of its present service. Appellant, therefore, contends that the question of whether or not the order of the Commission was based upon substantial evidence, and was decided with in the doctrine announced in *Universal Camera Corporation v. National Labor Relations Board* 340

U. S. 474, is a substantial question and is presented in concrete form for decision by this Court.

2. In disposing of the appellant's application, the Commission had much to say about failure of appellant to demonstrate the inadequacy of existing services. Appellant submits that in proving the necessity for continuation of its service, it showed that without such continued service by it there would be an inadequacy of service. The Commission's ruling, however, raises the question of whether or not the Commission may demand proof of a fact concerning which it is under no obligation to make a finding. It has been held, otherwise in *C E. Hall & Sons v. United States* 88 F. Supp. 596 and in *Lang Transportation Company* 75 F. Supp. 915, 931.

Appellees United States and Interstate Commerce Commission attempt to distinguish the Hall case from the instant case on the ground that in this case the Commission has never authorized the service. This is quibbling. The service rendered by appellant has been authorized by statutory grant and is in no way unlawful.

There is doubt as to just what this Court's ruling on the question is in the case of *Interstate Commerce Commission v. Parker* 326 U. S. 60. In their brief in opposition appellees United States and Interstate Commerce Commission say:

> "The rule that an applicant under Section 207 has the burden of showing inadequacy in the service offered by existing carriers is of long standing and has received judicial approval. It was tacitly recognized in *Interstate Commerce Commission v. Parker, supra,* at p. 69 and expressly declared in the dissenting opinion in that case (p. 74 and decisions cited in note 1)."

The dissent of Justice Douglas, joined by Justices Black and Rutledge, however, clearly shows that the dissent was based upon the failure to require proof of inadequacy of

existing services. Clarification of the position of the Supreme Court on this question will be of aid to the Commission and applicants.

In conclusion it is submitted that the questions are of sufficient substance to require full briefing and argument for their proper disposition, and the appeal should not be disposed of on Motion to Affirm and Brief in Opposition. The Motions to Affirm should be denied.

Respectfully submitted,

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